VISIA FINANCE BHD.

v.

LIM KOK BENG & ORS.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL SUIT NO. 23-257-86]
31 MAY 1990

CIVIL PROCEDURE: *Judgment in default - Liquidated demand - Order 13 r. 1(1) of the Rules of the High Court 1980.*

The plaintiff, under a loan agreement, lent the borrower certain monies secured by a charge over certain land; only part of this money was actually lent. The plaintiff also obtained a guarantee from the defendants. The borrower defaulted and the plaintiff commenced proceeding for the enforcement of the charge and the guarantee. Judgment in default of appearance was entered. The defendants then applied for setting aside of the default judgment, based on the principles enunciated in *Lam Kong Ltd. v. Thong Guan Co. (Pte.) Ltd.* [1985] CLJ (Rep) 181.

Held:

[1] *Lam Kong's* case has no relevance to this application as this is a claim for a liquidated demand and not for specific performance.

[2] The applicable rules are O. 13 r. 1(1) of the Rules of the High Court 1980.

[Application dismissed.]

Case referred to:

Lam Kong Ltd. v. Thong Guan Co. (Pte.) Ltd. [1985] CLJ (Rep) 181

Legislation referred to:

Rules of the Supreme Court 1957, O. 13, O. 13 r. 1(1), r. 12
Rules of the High Court 1980, O. 13, r. 1(1)

For the plaintiff - Lee Kok Leong; M/s. Lee Kok Leong & Co.
For the 2nd defendant - Darshan Singh; M/s. Darshan Singh & Co.

JUDGMENT

Edgar Joseph Jr J:

In this case, the plaintiff a licensed finance company had, at the request of the defendants, agreed to grant a loan to Jurubina Artisans Sdn. Bhd. ('the borrower') of RM4,300,000 secured by a charge executed by the latter over certain land. However, of this sum only RM1,600,000 was in fact lent the reason for this being that the borrower had not fulfilled certain conditions of the loan agreement. Be that as it may, quite apart from the charge, the plaintiff had obtained from the defendants a guarantee dated 23 April 1984 guaranteeing repayment of the said loan, interest thereon, costs, and all other sums payable by the borrower, as Principal debtors and not merely as sureties.

The borrower having defaulted with his obligations under the loan agreement the plaintiff commenced proceedings to enforce the charge and also issued the writ herein against the defendants to enforce the guarantee.

No appearance having been entered by the defendants or any of them within the time limited under the Rules of the High Court 1980, a Certificate of Non-Appearance dated 20 September 1986 was signed by the Senior Assistant Registrar of the High Court, and accordingly, on the same day, judgment in default of appearance in the sum of RM2,273,328.82 and interest thereon, at the agreed rate of 17% p.a. with monthly rests, and costs was signed against all the defendants.

Then, the defendants bestirred themselves by taking out the present application by way of summons in chambers (En.43) praying, *inter alia*, that the judgment in default be set aside.

Before me, Counsel for the defendants took one short point. It was contended that judgment in default had been entered contrary to the principles enunciated in the Supreme Court case of *Lam Kong Ltd. v. Thong Guan Co. (Pte.) Ltd.* [1985] CLJ (Rep) 181.

In that case, the plaintiff who had issued a specially indorsed writ for specific performance of an agreement had obtained judgment in default of appearance without setting down the action on a motion for judgment. In an appeal from a refusal of the Judge to set aside the default judgment, it was held that the default judgment had been obtained contrary to the requirement of O. 13 r. 12 of the Rules of the Supreme Court 1957, which precludes a plaintiff from entering judgment in default of appearance where there is indorsed on the writ a claim, *inter alia*, for specific performance and requires him to proceed with the action as if that defendant had appeared.

I note that the Rules of the High Court 1980, which apply to the present case have no provision corresponding to O. 13 r. 12 of the Rules of the Supreme Court 1957. More to the point, however, the plaintiff's claims against the defendants being for a liquidated demand, O. 13 r. 1(1) would appear to be precisely in point since it provides.

> Where a writ is indorsed with a claim against a defendant for a liquidated demand only, then, if that defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing, enter final judgment against that defendant for a sum not exceeding that claimed by the writ in respect of the demand and for costs, and proceed with the action against the other defendants, if any.

Accordingly, I did not consider that *Lam Kong's* case had any relevance to the present application.

In the result, the application was dismissed with costs.

Also found at [1990] 2 CLJ 197